U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

NORMAN E. PAWLOWSKI, **ARB CASE NO. 99-089**

COMPLAINANT **ALJ CASE NO. 97-TSC-3**

v. **DATE: May 5, 2000**

HEWLETT-PACKARD COMPANY,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
Richard C. Busse, Jr., Esq., *Busse & Hunt, Portland, Oregon*

For the Respondent:
Lawrence S. Ebner, Esq., *McKenna & Cuneo, L.L.P., Washington, D.C.*

FINAL ORDER APPROVING SETTLEMENT AND DISMISSING THE COMPLAINT WITH PREJUDICE

Norman E. Pawlowski filed a complaint alleging that Hewlett-Packard Company violated the employee protection provisions of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2622 (1994). The parties seek approval of their settlement agreement and dismissal of the complaint with prejudice.

BACKGROUND

On December 18, 1996, complainant Norman Pawlowski filed a complaint with the Department of Labor alleging that respondent Hewlett-Packard Company fired him because he complained that Hewlett-Packard failed to comply with chemical registration requirements. On May 12, 1999, a U.S. Department of Labor Administrative Law Judge issued a Recommended Decision and Order finding that Pawlowski established by a preponderance of the evidence that Hewlett-Packard violated the TSCA's whistleblower protection provisions when it terminated Pawlowski's employment in retaliation for his long history of protected activity. The ALJ ordered that Hewlett-

Packard reinstate Pawlowski to his former position and pay him back pay from the date the termination became effective until Pawlowski resumes employment.

On May 24, 1999, Hewlett-Packard petitioned the Administrative Review Board for review of the Recommended Decision and Order. Once Hewlett-Packard filed a timely petition for review with the Board, the ALJ's Recommended Decision and Order became "inoperative" pending issuance of a final order by the Board. 29 C.F.R. §24.8(a). On April 21, 2000, the parties submitted to the Board a Joint Request for Approval of Settlement Agreement to which they attached a Global Settlement Agreement and General Release of All Claims and All Parties.

DISCUSSION

The TSCA requires that the Secretary must enter into or otherwise approve a settlement. *See* 15 U.S.C. §2622(b)(2)(A). The Secretary, in turn, has delegated her authority to approve settlements to this Board (in cases pending before the Board at the time the parties enter into the settlement). Secretary's Order 2-96, 61 Fed. Reg. 19978 (May 3, 1996). We find the overall settlement terms to be reasonable, but include our interpretation of several of the provisions.

Review of the agreement reveals that it may encompass the settlement of matters under laws other than the TSCA. See Global Settlement Agreement ¶ 2. Our authority to review this settlement agreement is limited to the statutes within our jurisdiction and is defined by the applicable statute. *Accord Webb v. Numanco, L.L.C.*, ARB Case No. 98-149; ALJ Case Nos. 98-ERA-27, 28; Final Order Approving Settlement, Dismissing Complaint & Vacating Order of ALJ (Jan. 29, 1999). We have therefore restricted our review of the settlement agreement to ascertaining whether the terms of the agreement fairly, adequately and reasonably settle Pawlowski's allegations that Hewlett-Packard violated the TSCA.

Paragraph 3(a) of the agreement could be construed as a waiver by Pawlowski of future causes of action under the TSCA that he may have should he apply to Hewlett-Packard for re-employment. We interpret this provision as limited to the right to sue in the future on claims or causes of action arising out of facts occurring before the date of the settlement. *Accord Webb v. Numanco, L.L.C.,* slip op. at 3. *See also Alexander v. Gardner-Denver Co*., 415 U.S. 36, 51-52 (1974); *Rogers v. General Electric Co.*, 781 F.2d 452, 454 (5th Cir. 1986).

If the confidentiality provisions in ¶¶ 3(c) and 13 of the Global Settlement Agreement were to preclude Pawlowski from communicating with federal or state enforcement agencies concerning alleged violations of law, they would violate public policy and therefore, constitute unacceptable "gag" provisions. However, we interpret this language as not preventing Pawlowski, either voluntarily or pursuant to an order or subpoena, from communicating with or providing information to state or federal authorities about suspected violations of law involving Hewlett-Packard. As so construed, ¶¶ 3(c) and 13 do not contain invalid "gag" provisions. *Thornton v. Burlington Environmental and Phillip Environmental*, ARB Case No. 95-028, 94-TSC-2, Secretary's Final Order Approving Settlement and Dismissing Complaint (Mar. 17, 1995).

Paragraph 11(c) provides that "both parties agree that the terms of this agreement contain confidential commercial information pursuant to 5 U.S.C. §552(b)(4) and all parties will object to

and resist by all lawful and available procedures any disclosure of the terms of this Settlement even if the request is made through FOIA." We have held in a number of cases with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C.A. §552 (1996)(FOIA), "requires agencies to disclose requested documents unless they are exempt from disclosure. . . ." *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services,* ARB Case No. 96-141; ALJ Case Nos. 96-TSC-5, 6; Final Order Approving Settlement and Dismissing Complaint (June 24, 1996) slip op. at 2-3.

The records in this case are agency records which the agency must make available for public inspection and copying under the FOIA. In the event a member of the public requests the opportunity to inspect and copy the record of this case, the Department of Labor must respond to that request as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. Since no FOIA request has been made, it would be premature to determine whether any of the exemptions in the FOIA would be applicable and whether the Department of Labor would exercise its authority to claim such an exemption and withhold the requested information. It would also be inappropriate to decide such questions in this proceeding.[1/]

Paragraph 16 of the agreement provides that the agreement will be governed by the laws of the state of Oregon. We construe this provision to except the authority of the Administrative Review Board and any Federal court which shall be governed in all respects by the law and regulations of the United States. *Accord Nason v. Maine Yankee Atomic Power Co.*, ARB Case No. 98-091, ALJ Case No. 97-ERA-37, Final Order Approving Settlement & Dismissing Complaint (Mar. 20, 1998).[2/]

[1/] Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of such requests, and for protecting the interests of submitters of confidential commercial information. *See* 29 C.F.R. Part 70 (1999). Pursuant to 29 C.F.R. §70.26(b), submitters may designate specific information as confidential commercial information to be handled as provided in the regulations. When FOIA requests are received for such information, the Department of Labor shall notify the submitter promptly, 29 C.F.R. §70.26(c); the submitter will be given a reasonable period of time to state its objections to disclosure, 29 C.F.R. §70.26(e); and the submitter will be notified if a decision is made to disclose the information, 29 C.F.R. §70.26(f). If the information is withheld and suit is filed by the requester to compel disclosure, the submitter will be notified. 29 C.F.R. §70.26(h).

[2/] Paragraph 17 provides, "Should any of the provisions of this Agreement be declared or be determined to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provisions shall be deemed not to be a part of this agreement."

CONCLUSION

We find that the agreement, as so construed, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, we **APPROVE** the agreement and dismiss the complaint with prejudice.[3/]

SO ORDERED.

PAUL GREENBERG
Member

E. COOPER BROWN
Member

CYNTHIA L. ATTWOOD
Member

[3/] Given that Hewlett-Packard's timely appeal rendered the ALJ's May 12, 1999 Recommended Decision and Order inoperative by law, 29 C.F.R. §24.8(a), the parties' request that we vacate the Recommended Decision and Order is moot.